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## "FAMILY VALUES" AND FAMILY LAW REFORM

Harry D. Krause \*

Have you wondered lately about "family values"?<sup>1</sup> Will all be well again when Murphy Brown is replaced by Father Knows Best?<sup>2</sup> Or did it seem to you that the recent debate had all the unreality of a vice-presidential candidate squaring off with a TV character? (That was a vice-president for the United States, not CBS.)

Unreality? Remember, this was the year a non-viable, on-again candidate defined the post-Vietnam issues in the election campaign<sup>3</sup> and nearly had his daughter's wedding ruined;<sup>4</sup> Penthouse "exposed" Gennifer Flowers in full bloom to save the nation from sleaze;<sup>5</sup> abortion and sexual harassment endangered the Supreme Court; Woody Allen double-crossed the line between his reality and his fiction;<sup>6</sup> and Princesses Di and Fergie risked ousting the royal family.<sup>7</sup>

The past campaign's low-blow debate on family values accomplished nothing.<sup>8</sup> The sad thing is that the ratings war between Murphy Brown and Father Knows Best has nothing to do with today's family issues. Life is not as simple as switching to another channel or even to another candidate.

Deplorably, the pro-family message has gotten mixed up with the anti-tolerance message and seems to have turned the pro-tolerance message into

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1. William Safire, *Family Values*, N.Y. TIMES, Sep. 6, 1992, § 6 (Magazine) at 14.

2. Kevin Sack, *Quayle Tries to Separate Family Values and "Murphy Brown,"* N.Y. TIMES, Sept. 3, 1992, at A20.

3. H. ROSS PEROT, UNITED WE STAND (1992).

4. Eric Pianin & John Mintz, *Dirty Tricks Charged by Perot*, WASH. POST, Oct. 26, 1992, at A1; Steven A. Holmes, *Texan Says He'll Let It Drop—But Doesn't*, N.Y. TIMES, Oct. 27, 1992, at A1, A18.

5. Bob Guccione, the publisher of Penthouse, "said he 'decided to go ahead with it' out of fear of what would happen if her new allegations fell into the hands of media hostile to Bill Clinton's candidacy, which would neither treat them responsibly nor allow Governor Clinton an opportunity to respond . . ." Ralph Z. Hallow, *Flowers Bares All, Tells All*, WASH. TIMES, Oct. 17, 1992, at A1, A8.

6. Mona Charen, *Woody A Product of His Times*, CHAMPAIGN-URBANA NEWS GAZETTE, Aug. 27, 1992, at A4.

7. *Company Brief: House of Windsor*, ECONOMIST, Aug. 29, 1992, at 53.

8. *Transcript of First TV Debate Among Bush, Clinton and Perot*, N.Y. TIMES, Oct. 12, 1992, at A14, A16; *Clinton, Bush Spar on Family Values; Perot Ridicules Flap*, CHAMPAIGN-URBANA NEWS GAZETTE, May 22, 1992, at C1.

an anti-family message. But there really *is* a "family values" problem. David Hamburg writes:

[F]or the atrocities now being committed on our children, . . . we are all paying a great deal. . . . [I]n economic inefficiency, loss of productivity, lack of skill, high health care costs, growing prison costs, and a badly ripped social fabric.<sup>9</sup>

Mary Ann Glendon adds:

Neither historical nor comparative investigation has unearthed examples of institutions that can take the place of families, neighborhoods, and workplace and religious associations as places where these [pluralistic] skills and virtues can be generated, shaped, transformed, and transmitted from one generation to the next.<sup>10</sup>

Hamburg's and Glendon's focus on children mirrors my own definition of the meaning of "family values." They concern the raising of children. I don't much care what consenting adults do for or to each other.

When and how did the trouble with the family start? If it were possible to pick one point in time in a continuous process, I'd pick the 1960s.

The 1960s were revolutionary. *One* defining philosophical factor was that the long-held ideal of equality came into closer focus. What does that have to do with the family? Listen to John Rawls:

The consistent application of the principle of fair opportunity requires us to view persons independently from the influences of their social position. But how far should this tendency be carried? It seems that even when fair opportunity (as it has been defined) is satisfied, the family will lead to unequal chances between individuals. Is the family to be abolished then? Taken by itself and given a certain primacy, the idea of equal opportunity inclines in this direction.<sup>11</sup>

But it seems unlikely that the breakdown of the traditional family proceeded only from such lofty thoughts. The other philosophical factor that defined the 1960s was the assertion of a new, selfish individualism against the so-called "establishment," against traditional structures and strictures. The resulting gains or losses — depending on the eye of the beholder — were consolidated in the 1970s. From no-fault tort liability, to no-fault divorce, to no-fault sin. The 1977 bestseller *Looking Out For Number One*<sup>12</sup> defined the

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9. David Hamburg, *Family Crucible and Healthy Child Development* in CARNEGIE CORPORATION OF NEW YORK, 1991 ANNUAL REPORT 19 (1991).

10. Mary Ann Glendon, Preliminary Draft of the General Report: Individualism and Communitarianism in Contemporary Legal Systems 52 (1992) (unpublished manuscript on file with author).

11. JOHN RAWLS, A THEORY OF JUSTICE 511 (1971) (footnote omitted).

12. ROBERT J. RINGER, LOOKING OUT FOR NUMBER ONE (1977).

1980s. Where do we go from here?

I'll answer the old jurisprudential question of whether life follows law or law follows life, by compromising: Ideally, there should be some of both. To be effective, law cannot be removed too far from life, but sound law also can and should help channel life in terms of broader social needs. I do not think that we have fully understood the depth of the change around us. In one area, we have adapted the rules of the game too much and too soon and thereby accelerated social phenomena with which we might have been better advised to keep pace or, indeed, to differ. In other areas, we may have moved too cautiously.

By and large, I think that family law reform has failed because it has failed to respond effectively to continuing social needs. By and large, I think that many of the family law adaptations of the last thirty years have increased the cost and risk of marriage and responsible parenthood, reduced their advantage and not so subtly rewarded the opposite.

What has been lacking completely is effective integration of family law reform with the incentives and disincentives in our social welfare and the taxation systems. There may be an explanation, though no excuse, for that: In our federal system, family law is a state concern whereas welfare and taxation are primarily in the hands of the federal government. There has not been enough, if any, communication. I'll get back to that in my conclusion. First, I'll try to evaluate the effect on "family values" of reform in three core areas: Divorce, Unmarried Cohabitation and Child Support.

## I. DIVORCE

One divorce reform debate is over. Marital *status* is no longer seriously at issue. Divorce is available at the will of either the wife or the husband—regardless of fault or merit, or who did *what, for* or *to* whom. No-fault reigns even in those states that have retained fault grounds on their books as an option to no-fault divorce.

When status *was* the issue in divorce, the state presumed to reserve for itself the power to grant or deny divorce, depending on a historical (religious) definition of marital (moral) fault. In effect, that law prescribed that only an "innocent" spouse could divorce only a "guilty" spouse. Conversely, this meant that an "innocent" spouse could not be divorced against her or his will. "Guilt" and "innocence" were defined by the legal grounds for divorce. If one played by the rules, marriage provided economic stability and social security.

The reformers of the 1850s had complained that disaffected parties should be allowed to divorce for fault. The reformers of the 1960s proclaimed that

the traditional catalogue of marital fault grounds was too narrow and out of touch with the realities of modern marriage. But they still focused on *status*. It seemingly escaped their notice that *de facto* no-fault divorce had been practiced for centuries, and for decades ever more blatantly. Indeed, just before divorce reform finally swept the secular world in the 1960s and 1970s, upward of 90% of all divorces were "consensual."

In *practical* reality then, in contradiction to the law on the books, *status* had *not* been the important issue in divorce for some time. What the old law *really* meant was *not* that divorce was difficult. It meant that if one party wanted a divorce but had no "licensed" grounds, he had to negotiate and pay her price. Underhandedly, the grounds that ostensibly governed the issue of status, thus governed the financial consequences of divorce. The negotiation over status hid the *real* issue: *Economic* consequences. Divorce went at the price for which the "willing seller" would sell the marriage. That price was equal to what the "willing buyer" would pay for the divorce. Supply and demand were in equilibrium, "economics" worked. But where Judge Posner and the new Chicago Nobelist, Gary Becker, might praise the free market, others saw a sort of jungle law.

Where the professed aim of no-fault divorce reform was to bring humane sense to a corrupt process, the significant change it *actually* brought was divorce at the will of either party. At the margin, the move was from consensual divorce to unilateral divorce. What was hailed as reform reduced the role of contractual fidelity, and depreciated reasonable, economic reliance interests in the most confidential legal relationship. Marriage became the only contract out of which a breaching party may walk with impunity and, likely as not, profit. Perplexingly, this came to us at the very time when other areas of our law moved from *caveat emptor* to an extraordinary, unprecedented concern for the economic underdog.

Since the State no longer asks whether the dissonant parties should be granted or denied their divorce, financial arrangements now have *openly* taken center stage. Today's contested questions include the allocation of alimony, the distribution of property, and decisions on child support. But given the complexities of the task, the financial consequences of divorce have not been resolved as fully or as easily as was the status issue.

Who should get *how much, of what, from whom, and why?* The answer remains elusive and the task undone, although many laws have been passed. Twenty years too late, we are now struggling with it in the American Law Institute's new project on the consequences of "family dissolution"<sup>13</sup>—"di-

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13. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (1991) (preliminary draft no. 2).

vorce" in "old-speak."

Again, you are asked to believe that "marital fault" is irrelevant. The perception that inquiry into marital fault is futile and unpleasant had governed the early divorce reform debate. Remember, *there* the question was whether marital fault should govern the *status* decision, *then* the State presumed to reserve to itself the decision whether parties should be allowed to divorce at all. But once it had been resolved that "fault" should *not* answer the question whether to allow divorce, the reformers carelessly transferred their aversion to fault to the very different question of what the financial consequences of the termination of marriage should be.

Are the risks of marriage increased and is marriage diminished as a legal status, as an economic good, if "good" or "bad" behavior does not matter? Is it not intuitive—at least to anyone who is *not* a lawyer—that "fault" and "merit" *are* relevant to achieving "fairness?" They are relevant in all other areas of the law, so why not to the fair distribution of the financial burdens (and benefits) of divorce? The true question is *what* is fair, and *how* should we judge. I do not think that the standard, preferred answer "we can't tell, we don't want to know, and there's no such thing as a nice husband or a nice wife anyway" is wholly satisfactory.

This idea is not picked out of the air. In several states, an extreme return to marital fault through a side door—or rather through a dark basement—is now creating havoc with no-fault divorce.<sup>14</sup> *Tort law* has become the vehicle, alongside or after a divorce action, to compensate one spouse financially for "emotional distress" inflicted during the marriage by the other spouse. Let me brief one case.

In 1988, a jury in Houston awarded a divorcing wife \$1.4 million, for "severe emotional distress" caused by her husband's marital misconduct.<sup>15</sup> Not the National Enquirer, but the Wall Street Journal reported that "on a visit to her husband's office in 1986, she found him sprawled nude with a former company secretary."<sup>16</sup>

I am not interested in defending family lawyer's turf. But I worry, along with the Vice-President, when those "sharp tort lawyers" in their "tasseled loafers"<sup>17</sup> gloat:

Marital tort litigation took off and shows no signs of regressing.  
Nationwide, marital tort recoveries are high. . . . When considering

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14. Rorie Sherman, *When Divorce Is Not Enough*, NAT'L L.J., Sept. 23, 1991, at 1.

15. *Chiles v. Chiles*, 779 S.W.2d 127 (Tex. Ct. App. 1989).

16. Carolyn Phillips, *Divorce Case Marks First Time a Spouse Wins Civil Award for Emotional Distress*, WALL ST. J., Feb. 2, 1988, at 39.

17. Alessandra Stanley, *Selling Voters on Bush, Nemesis of Lawyers*, N.Y. TIMES, Aug. 31, 1992, at A1.

the more common torts — such as intentional or negligent infliction of emotional distress, assault, defamation, false imprisonment, and interference with child custody — counsel must give careful thought to asserting as an element of damages post-traumatic stress disorder (PTSD). This is a mental health disorder precipitated by a psychologically traumatic experience outside the range of usual human experience, such as serious physical or emotional injury. . . . Counsel must know how to make the client's distress come alive to the trier of fact. [And here is the tort lawyers' conclusion:]

State no-fault statutes often do not do enough to redress wrongs. With no-fault, one spouse may abuse the other without legal consequence — even though the conduct would be deemed tortious if committed by a non-spouse.<sup>18</sup>

Well, I think that it is the very essence of marriage that it is *not* a relationship between strangers. But I agree that the idea of right and wrong is one whose time has never gone. Its return to the financial aftermath of marriage through *tort* law, however, can only reintroduce to the divorce process more and worse acrimony than no-fault divorce ever eliminated.

By all means, let us stay away from the traditional mechanical application of the old fault grounds for divorce, from adultery to desertion. But a new concept of "fault" can and should be factored into the decision how to apportion the financial burdens or benefits of divorce. Call it "blame" and "merit" if you prefer. Or think in terms of "unjust enrichment" or "quantum meruit."

Is there a way to deal responsibly with those cases of marital misconduct that overstep the bounds of the marital relationship? A few years ago Germany abandoned the pure "no fault" approach and reintroduced a modified and limited catalogue of "blame-and-merit" considerations to the apportionment of financial consequences on divorce, as follows:

A claim for support must be denied, reduced or limited in duration, if the imposition of the obligation . . . would be grossly inequitable because . . . (2) The recipient is guilty of a crime or of a severe intentional offense against the obligor or against a near relative of the obligor; (3) The recipient has caused his or her own need intentionally or recklessly; (4) The recipient has intentionally or recklessly disregarded significant financial interests of the obligor; (5) For a considerable period of time before the separation, the recipient has grossly violated his or her duty to contribute to the support of the family; (6) The recipient is responsible for obviously serious,

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18. Roxanne Barton Conlin, *A Safer, Saner, Fairer Nation*, TRIAL, Oct. 1992, at 7.

clearly unilateral misconduct against the obligor; . . . !<sup>19</sup>

Is that ridiculous? No. Can it be improved upon? Probably. Perhaps it is not fair that this provision—as did our abolished marital fault law—paves only a one-way street: Fault is used only to allow the *escape from*, or *reduction of*, an obligation; perhaps fault should also weigh in by increasing the load? That of course is the answer tort law provides, and it may not be *all* wrong. I *am* sure that playing with tort law is the worst-case alternative,<sup>20</sup> and whatever may be the appropriate answer, however, it should be developed in the context of divorce law.

Another reform trend that has increased the risk of marriage is the trend toward decreased provision for a spouse on divorce—even where that dependency was created by marriage and, particularly, marital role division.

Nearly accomplished legal equality of women and men and related social change have accelerated emotion-charged attack on the alimony front<sup>21</sup>—even while eligibility for alimony has been extended to men.<sup>22</sup> “Men’s libbers” proclaim that they should not be forced to support “alimony drones.” They add that women should no longer view marriage as “a bread ticket for life.” Feminists consider alimony demeaning, as it spells continued financial dependence on a possibly despised ex-spouse. Adding insult to injury, alimony may subject the recipient to nasty conditions, involving her post-marital sexual behavior. As you probably know, traditional alimony ended on the ex-wife’s remarriage and now, in some cases, when she “cohabits”—whatever that may mean.<sup>23</sup>

To escape the acrimony of alimony, and to achieve finality in the divorce, the emphasis now is on property division. Actually, there has long been full equality between husband and wife in matters of property: Each owned until *and kept after* divorce, all property that he or she had earned during the marriage. The only problem with that equality was that typically only one of them had earnings. Guess who! Commendably, the treatment of property on divorce has undergone fundamental change, favoring the economically weaker spouse, typically the wife.

All too often, however, the overarching goal of modern divorce, *finality*, collides with the reality that there is no significant amount of property. The

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19. Civil Code (BGB) § 1579 (F.R.G.).

20. A somewhat less categorical answer may be called for in the case of physical injury, as distinguished from the psychological/intangible harm in my example above.

21. *E.g.* Kennedy v. Kennedy, 303 So. 2d 629, 631 (Fla. 1974); In Re Marriage of Brantner, 136 Cal. Rptr. 635, 637 (Cal. Ct. App. 1977).

22. Orr v. Orr, 440 U.S. 268, 283 (1979).

23. *E.g.*, In Re Sappington, 478 N.E. 2d 376, 378 (Ill. 1985) (interpreting ILL. REV. STAT. ch. 40, para. 510 (b)). *Cf.* N.Y. DOM. REL. LAW § 248 (McKinney 1986); CAL. CIV. CODE § 4801.5 (West 1983 & Supp. 1983).



compromise between the need for provision and the goal of finality is that, when post-divorce *maintenance* is provided, today's theme is "rehabilitation." *From* what? From nothing more or less than motherhood, formerly revered as much as apple pie. Rehabilitation *to* what? To self-support, but all too often without adequate concern for the dependent spouse's lack of adequate economic opportunity. The very word "rehabilitation" suggests pathology. It implies that the marital role-division that makes full-time parenthood possible is now considered pathological.

This sounds harsh, but we may actually be on the right track. The tradition of full-time motherhood, *as an exclusive track for women*, really was *not* a fair societal response to the *joint* parental responsibility of child rearing. (Indeed, neither was the role of *sole* financial supporter that was thrust upon the man).

Marriage and procreation have only recently been "certified" by the United States Supreme Court as fundamental human rights.<sup>24</sup> But one may fairly conclude that our present legal/economic/social circumstances have rendered these rights less meaningful by making their exercise too costly. The legal and economic incentive structure may already be so loaded against the role-divided family that an intelligent woman or man no longer has a reasonable choice to forgo market participation in favor of family role division.

Which alternative do you prefer: Should a reformed incentive structure provide parents (fathers *or* mothers) a "more equal" choice between participation in the market place and dedicating themselves to their family? Or should we define a fair compromise between career and child rearing for men *and* women?

## II. UNMARRIED COHABITATION

After what I have said of the dangers of marriage followed by divorce, it is no surprise that marriage is on the rocks. To the middle class, "role division" now poses risks that many reasonable women and men consider unacceptable. Traditional marriage may sound bad for the economically weaker spouse, but the cost of post-divorce economic provision for children and ex-spouse may also bring the "earner-spouse" to the financial breaking point. Not coincidentally, new attitudes toward sexual companionship, marriage, and family formation have become socially and legally acceptable. Many modern couples think that the commitments and burdens of marriage outweigh its advantages.

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24. E.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Cf. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

It is one very practical attraction of unmarried cohabitation that no potentially costly procedures are needed to end the relationship. Even better, the financial consequences of divorce — though not child support — are avoided. For *two-earner couples* who are conscious of tax law and social welfare benefits, cohabitation may bring financial advantages over marriage. For the *feminist*, cohabitation promises freedom from traditional male dominance that is perpetuated in antiquated marriage and family laws. For the “*unemancipated*” recipient of welfare benefits, or of alimony derived from a first marriage, remarriage or marriage may be costly if, as is often the case, these payments are thereby terminated.

*Traditionalists* fear that formal marriage is depreciated if legal incidents similar to those of marriage are bestowed on unmarried cohabitation. *Pragmatists* are concerned about the legal uncertainties that are created if, typically retrospectively, informal relationships are judicially held to be endowed with legal rights and obligations that, at best, were thoroughly unclear during the ongoing relationship. *Historians* see a replay of developments that, in 1753 in England, led to the abrogation of common law marriage. *Cynics* remember the old-time semi-legal status of the “concubine.” Least pleasantly, *Marvin v. Marvin*<sup>25</sup> has emerged as a legalized blackmail weapon for disappointed lovers, akin to, but more troublesome than even the old-fashioned “heartbalm” actions. To underscore this last point, numerous prominent figures, including Billie Jean King, Liberace, Ringo Starr, Daryl Zanuck, Alice Cooper, Peter Frampton, and the Bloomington estate have been sued and several have made expensive settlements—less perhaps because the paramour could not have been defeated, and more, probably, to avoid embarrassing publicity.

For the really sophisticated couple, unmarried cohabitation seems to afford an opportunity to define the terms of their relationship individually and precisely. This opportunity was largely denied them by traditional marriage law, which overrode attempts at contractual variation of essential rights and duties the law deemed inherent in marriage. Ironically—in a “Gresham’s Law” response—the widely adopted “Uniform Premarital Agreements Act”<sup>26</sup> and similar laws now allow the partners to define and downgrade the legal consequences of their marital relationship “à la carte.” Marriage is declining not only in numbers but in legal content. Deregulation is the word.

Ironically, many of the same “progressives” who enthusiastically applaud the “*deregulation*” of the formal family now call for the *regulation* of the

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25. 557 P.2d 106 (Cal. 1976).

26. UNIF. PREMARITAL AGREEMENTS ACT, 9B U.L.A. 371 (1987).

*informal* family. Non-marital cohabitation is practiced so widely that legal consequences—a sort of forced marriage, second class—are being proposed. Is it “progress” to regulate free love? Is it “reactionary” to express concern about the resultant decrease in freedom of choice of sexual lifestyle?

In several celebrated cases, legal consequences have been ordained by important courts, in others denied. Two leading cases illustrate the range of opinion. In *Marvin v. Marvin*,<sup>27</sup> Lee while still married to Betty, had an affair with Michelle who became his companion for almost six years. Lee stopped paying one year and a half after he had “compelled” Michelle to “leave his household.” Michelle sued. The Supreme Court of California lip-served the traditional view: “The courts should enforce express contracts between nonmarital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services.”<sup>28</sup> But from there, the court proceeded “on the principle that adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights.”<sup>29</sup> Indeed, absent an express contract,

[T]he courts may inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract or implied agreement of partnership or joint venture, or some other tacit understanding between the parties. The courts may, when appropriate, employ principles of constructive trust or resulting trust. Finally, a nonmarital partner may recover in quantum meruit for the reasonable value of household services rendered less the reasonable value of support received if he can show that he rendered services with the expectation of monetary reward.<sup>30</sup>

The Illinois Supreme Court’s decision in *Hewitt v. Hewitt*<sup>31</sup> is the antithesis of *Marvin*. A dentist had held out Victoria as his wife for fifteen years. She had borne and raised their three children. When Victoria sought a divorce, her dentist (whom she believed to be her husband) confronted her with the information that they had never been legally married. And in fact, their cohabitation *had* started with her pregnancy, and no marriage ceremony had ever been performed. Apparently overwhelmed by the appellate court’s full-scale embrace of the *Marvin* doctrine in favor of Victoria, the Illinois Supreme Court held wisely that the situation was too complex for judicial resolution and should be left to the legislature. Unwisely and unnec-

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27. *Marvin*, 557 P.2d at 106.

28. *Id.* at 110.

29. *Id.* at 116.

30. *Id.* at 122-23 (citations omitted).

31. *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979).

essarily, the Court proceeded to conclude that Miss Hewitt had no rights whatever.

Problems of proof and problems of substance raised by the cohabitation cases are indeed serious, but they must not lead toward a solution along the lines of *Hewitt*. To reach a result fairer to Ms. Hewitt, the Illinois court did not need *Marvin*. The court might have drawn on old-fashioned theories of estoppel (the dentist should not be heard to deny that he is married),<sup>32</sup> or it could have played a little loosely with the fact that the parties' original cohabitation took place in Iowa which recognizes common law marriage.<sup>33</sup> Many of our courts have routinely (and sometimes not a little retrospectively) used the concept of common law marriage to do "Justice" when they felt that strict adherence to legal norms would produce injustice.<sup>34</sup> Indeed, most of the cases that seem to accept the *Marvin* doctrine may be explained in just those terms.<sup>35</sup>

The key to a sensible solution lies here: Where there has been a long-standing, marriage-like, role-divided, child-bearing, and child-raising relationship, a quasi-marital, legal relationship is properly thrust upon a man and a woman—especially (but not only) in case of the death of one of them.<sup>36</sup> In sum, nothing much short of the *Hewitt* facts should have spawned a doctrine protecting "quantum-meruit-cohabitation." The *Hewitt* situation merited protection, the *Marvin* affair did not. Both cases were decided precisely wrong!

Most of the learned discussion, the decided cases, and my conclusion just stated emphasize the rights of the parties vis-à-vis each other. Surprisingly, there has been little thoughtful commentary on the equally important issue of what judicial or legislative recognition should be given to the relationship between the unmarried couple and the "welfare state."

What "public" legal consequences should attend unmarried cohabitation? For instance, should cohabiting partners be permitted to pay income tax at rates favoring married partners? Should they be required to pay marital

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32. *But cf.* *Watts v. Watts*, 405 N.W.2d 303 (Wis. 1987) (rejecting plaintiff's invocation of the doctrine of marriage by estoppel).

33. *Estate of Dallman*, 228 N.W.2d 187 (Iowa 1975).

34. *Renshaw v. Heckler*, 787 F.2d 50 (2d Cir. 1986); *but cf.* *Lynch v. Bowen*, 681 F. Supp. 506 (N.D. Ill. 1988).

35. See Harry D. Krause, *Legal Position: Unmarried Couples*, 34 AM. J. COMP. L. 533 (Supp. 1986).

36. N.H. REV. STAT. ANN. § 457:39 (1955, Supp. 1992). "Persons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for the period of 3 years, and until the decease of one of them, shall thereafter be deemed to have been legally married." *Id.* "In all civil actions, except actions for criminal conversation, evidence of acknowledgment, cohabitation, and reputation is competent proof of marriage." § 457:40.

rates if that would be to the advantage of the tax authorities? If unmarried cohabitants are allowed to waive mutual support liability, should the welfare authorities (taxpayers) be bound by such a contract? Should a dependency relationship based on unmarried cohabitation trigger welfare eligibility when the "provider" leaves? Should welfare and similar benefits be terminated when a *de facto* "provider" enters the picture? Should cohabitants have standing to sue for loss of consortium and wrongful death benefits?<sup>37</sup>

The key to the answer is, I think, that no legal obligation of support between cohabitants compensates the taxpayer for extending legal benefits of marriage. In *marriage*, on the other hand, society extends legal privileges and economic benefits in exchange for the partners' legally *enforceable* promise to support each other, before they may call on the taxpayer to come to their rescue.

The legal ramifications of unmarried cohabitation will remain at the "cutting edge" of developments for some time. The old family is no more, but the new family is not yet. The revolution is not over, but the debate has shifted from asking *whether* unmarried cohabitation may produce legal and financial consequences, to *what* these consequences should be. In that sense, the cohabitation debate may subtly be turning into a modern redefinition of "marriage."<sup>38</sup>

I'll end this segment on a positive note: The most important consequence of non-marital cohabitation is legally solved. Non-marital children have about the same legal rights with respect to both parents as do the children of married parents.<sup>39</sup> Indeed, some unmarried fathers are gaining custodial rights to their non-marital children.<sup>40</sup> Legal equality, however, does not necessarily provide *de facto* equality. As a generalization, the unmarried father—and even the divorced father—very typically does not have enough money to provide an adequate level of financial support.

### III. CHILD SUPPORT AND ITS ENFORCEMENT

In fiscal year 1990, the federal Office of Child Support Enforcement collected six billion dollars. OCSE also reports that the aggregate amount of

37. The City of San Francisco provides employee insurance to lovers who play the role of stay-at-home spouse, and the City of Berkeley has adopted an ordinance assimilating marriage and cohabitation in terms of social and welfare benefits.

38. Or not so subtly. *De Facto Relationships Act*, N.S.W. Inc. Acts (Austl.), No. 147 (1984) reprinted in Harry D. Krause, *FAMILY LAW: CASES, COMMENTS, AND QUESTIONS* 162 (3d ed. 1990).

39. HARRY D. KRAUSE, *CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE* 115-162 (1981).

40. UNIF. PUTATIVE AND UNKNOWN FATHERS ACT, 9B U.L.A. 39 (Supp. 1992); see *Lehr v. Robertson*, 463 U.S. 248 (1983); but see *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

child support payments due for 1989 was \$16.3 billion, whereas payments totalled only \$11.2 billion.<sup>41</sup>

Why are these 5 billion not collected? Let's put aside the cases in which the custodial parent supports the child adequately and, for reasons of her own, does not wish to impose on the absent parent. This leaves two alternative explanations of inadequate support: Either the state makes an inadequate effort to enforce existing law, or many absent fathers do not have the money to render adequate child support. Since the applicable law and enforcement efforts increasingly are up to the task, I think the answer is that a large number of defaulting fathers do not have (and never had) the missing money. When I go to our local court on "deadbeat daddy's day" as one of our judges calls the event, I see a parade of unemployed, and often unemployable, teenagers being confronted with unmeetable financial obligations, arising, ironically, out of constitutionally protected conduct. And that is in a relatively affluent midwestern community, nothing like the big city.

Looking now at detailed collection statistics at the AFDC-receiving bottom of the social pyramid—or has it become a diamond?—I see that we currently spend nearly as much on collection as we collect.<sup>42</sup> A cynic might say that child support collection has been turned into an income transfer program from poor fathers to lawyers and welfare bureaucrats.

Please do not misunderstand. I favor strict child support enforcement and have worked hard to improve federal and state law toughening enforcement.<sup>43</sup> But I now find it troublesome that the absent welfare father's child support obligation has become the *only* true faith. Putting it bluntly, we have shifted our disapproving eye from what was considered the immorality of the mother to the immorality of the father. Like the cyclops of old, we seem to have only one eye. To the extent we are now driven to see child support enforcement as the *sole* solution to child poverty, we are as wrong as we were in the 1960's when we saw the AFDC program as the *only* appropriate source of support for female-headed families. Worse, our preoccupation with the irresponsibility of many absent fathers has displaced awareness of the reality of the limited resources of many absent fathers. It has made a responsible dialogue over *public* responsibility much more difficult.

Our extreme focus on the absent father has dissipated any sense of urgency for public help for children. After voting for tougher child support

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41. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERV., CHILD SUPPORT ENFORCEMENT 5 (1990).

42. *Id.* at 12.

43. E.g. HARRY D. KRAUSE, *supra* note 39.

enforcement, the state and federal legislator is proud that something has been done for children—and at no public cost.

My point is that we are not dealing *only* with the failure of *private* responsibility.<sup>44</sup> Whatever our views on the father's and mother's morality or irresponsibility, we cannot fairly transfer our disapproval or *laissez faire* tolerance to the child and limit social intervention to the prevention of outright starvation, at a level well below our own official definition of the poverty standard. When there is no other source, the adequate support of children is a *public* necessity. Quite aside from the issue of fairness, we shall have to live with these children! Indeed, we shall have to live "off" them: They will have to support us in retirement!

Future reform in child support requires (1) recognition of the economic reality that many defaulting fathers simply do not have what it takes to support their children, (2) careful consideration of the heretical notion that it may not be fair to ask *all* absent parents to foot the *entire* bill,<sup>45</sup> and (3) a clear understanding that children have a direct claim on society at large, along with their parallel claim on their parents.<sup>46</sup>

#### IV. CONCLUSIONS

Each in its own way, these three stories contribute to my impression that the law has not been a good midwife to the painful birth of our new family. More radical approaches—of which only outlines can be seen—need to do justice to the new facts of procreative life.

To deplore the demise, and wish for the return, of the gender-role stereotyped traditional family—as many do who urge a return to "family values"—is a pointless exercise. The role-divided family existed in, and was

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44. *Although Sometimes We Certainly Are: GOP Donor Accused of Failing to Provide*, CHAMPAIGN-URBANA NEWS GAZETTE, Oct. 12, 1992, at B10.

45. Is there a contradiction between lifting all "prior restraint"—social and criminal sanctions—on consensual nonmarital sexual activity and then insisting on strict enforcement of a civil liability that often amounts to eighteen years of potentially extreme restriction on the accidental (or in any event, *absent*) parent's lifestyle? Is there a contradiction on divorce, when we terminate the noncustodial parent's parental interest *de facto* and impose on him a greater and less flexible support obligation than the burden he shouldered in the ongoing family? Will rigid enforcement of high levels of child support, along with the risk of easy divorce and consequent *de facto* termination of the father-child relationship, prove to be a disincentive to responsible men to father children? Is the mere existence of a biological link enough? Or has the rationale for the *absent* parent's support obligation weakened? Is the father's demotion from cherished patriarch to absent parent entirely irrelevant to his obligations? Should a noncustodial ("second class") parent pay "first class" support? What level of support obligation is consistent with modern family ties?

46. These matters are discussed in detail in Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 1989 U. ILL. L. REV. 367 (1990).

suited to, its time. That was the time *before* effective means of birth control, *before* women's economic equality, *before* unaffordable college costs and *before* divorce at the drop of a dinner plate. That old family is not coming back. Perhaps it wasn't even so much fun while it lasted. Neither in terms of prescribing rigid family roles for men and women, nor in terms of the confining content of each of these roles. Nor, importantly, for children.<sup>47</sup> Barbara Woodhouse reports:

[In Lincoln, Nebraska], each year, some 400 fathers hired out their entire families to work the beet fields, leaving the city for the beet field shacks in early spring before school closed and remaining until late fall after the start of the new school year. Said one farmer, "kinder eat—must work." For these families, the "family system" of contract labor operated to preserve German culture and patriarchal family structures at the expense of common schooling and English language fluency. One father explained, "In the city, I'd have to get me a job and work the year round. This way, in the country all the kids and the woman works. . . ."<sup>48</sup>

Ja, the good old days!

Professor Woodhouse continues:

Children's labor in early twentieth-century America was still, quite literally, parental property. Under the "family labor system," the employer would contract with the head of a family to pay to him a given sum in exchange for the labor of all or some family members. Children who received pay envelopes were expected to turn them over to the parent unopened.<sup>49</sup>

Be that as it may have been, it *is* clear that the old family model is not suited to the present—which is the reason it is dying. Evolution dissolves, evolves and, with our help, resolves.

Reproduction and child-rearing were the defining social functions of the traditional family. Reproduction and, more importantly, child-rearing remain among *the* most important social imperatives.

If the old structure no longer serves, what is to be the new? What is the most intelligent legal response to our looser, freer lifestyles? Whatever else we decide regarding the conduct of consenting adults, we need to be reminded that children are not adults and they are not consenting. Giving

47. David Shribman, *How Tots Helped with the West*, WALL ST. J., Aug. 5, 1992, at A12.

48. Barbara B. Woodhouse, *Who Owns the Child?: Meyer and Pierce and the Child as Property*, 33 WM & MARY L. REV. 995, 1063-64 (1992) (footnotes omitted) (emphasis added).

49. *Id.* at 1064.



them the right to "sue" their parents for "divorce"<sup>50</sup> is nonsense, but I am sure that there must be a basic redefinition of society's involvement with the parent-and-child relationship. The tinker-type reforms of the last thirty years will not do.

In one of his last opinions, Justice Brennan wrote:

In the Republic and in The Laws, Plato offered a vision of unified society, where the needs of children are met not by parents but by the Government, and where no intermediate forms of association stand between the individual and the State. The vision is a brilliant one, but it is not our own.<sup>51</sup>

Indeed it is not. We seem to be moving not toward a "unified society," but toward a fractured society in which the needs of children are "met not by parents" *and not* "by the government."

What to do? First, the *disincentives* to having children for those who could afford them have been entirely too effective. Reproduction and child rearing rates of those who could afford children, were they inclined to have them, may already have dropped to levels endangering our economy and the social security system. I think I have made the point that, for thinking women, the instability of modern marriage has raised to nearly unacceptable levels the economic risk of choosing the home and children over a career. And for thinking men, the certainty of rigorous child support enforcement combined with the risk that a financially disabling "no-fault" divorce may be imposed on them, has raised the cost of marriage. In any event, it should make them think twice before "assisting" in the "production" of children. Even *happy* couples limit reproduction under the pressure resulting from both parties' pursuit of individual careers and the crushing expense of rearing the modern child. Given effective birth control, ready access to abortion, the mutual risk of easy divorce, and the sheer fun of having personal freedom and lots of money—at least after the student loans are paid—increasing numbers of couples choose to remain childless altogether. In short, the opportunity cost of responsible child rearing has become all but prohibitive. It seems fair to say that the current incentive structure for child bearing and child raising delegates, *de facto*, the bulk of the child-raising chore to those least able, to the economic strata without adequate income (especially unmarried, divorced, and unemployed women).

I think that those couples with double incomes and no kids (DINKS) do not yet understand that their *own* future and their own retirement are di-

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50. Walter Goodman, *Boy Sues for the Right to Pick His Own Parents*, N.Y. TIMES, Sept. 18, 1992, at C34; *Gregory Needed the Divorce*, N.Y. TIMES, Sept. 29, 1992, at A22.

51. *Bowen v. Gilliard*, 483 U.S. 587, 632 (1987) (Brennan, J., dissenting) (citation omitted) (emphasis added).

rectly in jeopardy. Only a healthy, educated, and willing working generation will provide a liveable society as well as generate the necessary income to provide retirement for their predecessors in the work place.<sup>52</sup> In short, *having* children is not just a private matter—and *neither is not having children!*

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guarantees that most of today's Third World countries will be poor one hundred years from now. It is simply impossible for any country to become rich in the context of a rapidly rising population. The reasons are simple. To make new human beings into modern productive workers takes a lot of investment. . . . A few American numbers illustrate the problem. If a new American is to have the average amount of space, a \$20,000 investment has to be made in his or her housing. Until that new American is old enough to begin work, he or she will require feeding — another \$20,000. To get to the average American educational level, he or she will require \$100,000 in public and private expenditures. For that individual to attain the average American productivity at work, another \$80,000 investment will have to be made in plant and equipment. Yet another \$20,000 will be necessary to build the public infrastructure (roads, sewers, water mains, airports) needed to support that individual. Basically, each new American will require an investment of \$240,000 before he or she is capable of fitting into the American economy as a self-sufficient, average citizen-worker-consumer.<sup>53</sup>

Without these investments, will we become a "third world" country?<sup>54</sup> Recent statistics on the decline of American family income may forecast an unpleasant answer.<sup>55</sup>

Whatever we do, we must stay in line with our surviving cultural values. These prominently include the parents' right to autonomy and privacy. But as its corollary, parental responsibility, has slipped, we must not carry our respect for parental rights to the point of harming the child—as I think we have of late. Recent trends of non-intervention, of "privacy" and "value neutrality" favor parental autonomy in procreation and child-rearing too decisively.<sup>56</sup> There has been far too little regard for the social and educational needs of the twenty percent of all children who even now live *under* the

52. Erik Eckholm, *Payments to the Retired Loom Ever Larger*, N.Y. TIMES, Aug. 30, 1992, at E1, E4.

53. LESTER THUROW, *HEAD TO HEAD* 205-06 (1992).

54. *Economic and Financial Indicators*, ECONOMIST, June 27, 1992, at 119.

55. Robert Rector, *America's Poverty Myth*, WALL ST. J., Sept. 3, 1992, at A10; Robert Rector, *Government Couldn't Buy a Victory in the War on Poverty*, CHAMPAIGN-URBANA NEWS GAZETTE, Sept. 6, 1992, at B1.

56. *Santoskey v. Kramer*, 455 U.S. 745 (1982); *Lassiter v. Dep't. Soc. Serv.*, 452 U.S. 18 (1981).

poverty line.<sup>57</sup> Again, I hasten to emphasize that the *private* sphere must indeed remain free of state intrusion, but the “private sphere” has been wrongly defined to include areas that are of major public, of societal consequence, and thus of *legitimate* public concern.

These are not convenient or easy questions. Beyond looking for simple social efficiency—how to raise *law abiding*, *work willing* and *work able* citizens—we have to weigh our broader values. And we cannot, nor do we want to, get away from the family. The family has been the essential transferor of cultural identity—ethnic, national, religious. Whether that be Black, Hispanic, German, Polish or Italian, Catholic, Protestant, Jewish, or whatever. Our traditional commitment to cultural plurality truly is for better *or for worse*, because there can be little doubt that Rawls is right, the family *does* stand as an obstacle to equality. What then is more important? I have an intriguing answer: The Gallup International Research Institute reports that only 20% of Americans believe that equality is more important than freedom and 72% believe that freedom is more important than equality—compared with, for instance, Italy which is evenly divided on the issue.<sup>58</sup>

So we *are* willing to pay a price to preserve the multifaceted culture which is our freedom. The essential question for child and family policy is, how high that price may be. And how we might reduce that price through just that degree of intervention that preserves, not destroys, the very values we are after.

I'll look at one more current issue: Family Leave. In September, President Bush vetoed a proposal that would have given unpaid family-related leave to employees of enterprises employing more than 50.<sup>59</sup> The President did *not* say that the bill was anti-family. He *might* have argued that such a law would encourage parents to leave their family homes for outside employment, and that would be bad for “family values.” But he did not say that. Instead, he said that family leave would cost too much. Unpaid though that leave would be (in distinction to paid family leave that is provided by many of our successful international competitors), it would cost too much in terms of economic disruption and resulting inefficiency. (Then he proposed a \$500 million-a-year alternative that would pay the employer, *not* the employee,

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57. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 456 (1992).

58. *Life, Liberty and Try Pursuing a Bit of Tolerance Too*, ECONOMIST, Sept. 5, 1992, at 19, 20.

59. Michael McQueen, *Family-Leave Bill for Emergencies is Vetoed by Bush*, WALL ST. J., Sept. 23, 1992, at C13.

through tax credits).<sup>60</sup>

Let us assume that the President is correct, and that there would be no offsetting *economic* benefits through less distracted, happier workers. Let us agree that to grant unpaid family leave would carry a net economic cost.<sup>61</sup> Must not the next question be whether the gain on the family front would be greater than the loss in the economy? This is another question of whether the price is right or the cost too great.

We must balance the cost in terms of the possible work-inefficiency of a family-friendly work environment,<sup>62</sup> against the cost in terms of family disincentives through a family-unfriendly work environment. The outcome of that evaluation depends on the answer we give to the old cliché: Do we work to live, or do we live to work?

It is 1993. Unprecedented socio-economic change has provided equality for women. Equality with what? Equality in the work place with the formerly exclusively male model of the full-time worker. But that male lifestyle had been reconcilable with the family's child-rearing function only through role division. I see an unbridgeable conflict between the two-full-time earner family and the child rearing function that formerly was performed by the one-earner, role-divided family. This judgment has nothing to do with family *values*, it reflects the practical *reality* that, for an overwhelming number of reasons—instability of marriage, easy divorce, professional fulfillment, economic independence—it makes sense for both parents to be active in the “paid” economy. We have changed the way we live, but we have not changed the way we work.

Let's adapt the work place to the way we live and not *vice versa*. Unpaid family leave would be a very modest beginning. Part-time work, flex-time jobs, “telecommuting,”<sup>63</sup> day care<sup>64</sup> and year-around schools<sup>65</sup> are other pieces of the answer. Again, what about the cost? Let me remind you that we have been willing to swallow considerable economic inefficiencies by ad-

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60. James Gerstenzang, *Bush Proposes Alternative to Family Leave Measure*, L.A. TIMES, Sept. 17, 1992, at A1.

61. Richard A. Epstein, *As Unions Decline, Labor Laws Constrain the Job Market*, WALL ST. J., Sept. 2, 1992, at A11.

62. Sue Shellenbarger & Cathy Trost, *Annual List of Family-Friendly Firms is Issued by Working Mother Magazine*, WALL ST. J., Sept. 22, 1992, at A2; *Working Mother Names Top 100 Companies for Working Parents*, 5 NAT'L REPORT ON WORK & FAMILY 20, at 1 (1992).

63. *16,000 Bell Atlanta Members Eligible for Telecommuting*, 5 NAT'L REP. WORK & FAM. 21, at 1 (1992).

64. *Commuter Child Care Center Set to Open Near Chicago*, 5 NAT'L REP. WORK & FAM. 21, at 1 (1992).

65. There is a serious problem with lack of air conditioning.

justing the work place to the needs of the handicapped.<sup>66</sup> We have accepted great economic cost to protect the work place.<sup>67</sup> We go *all* out for the environment.<sup>68</sup> Where do we place the family on the scale of social values that transcend work-efficiency?

It will have to be the task of the 1990's to develop new incentive structures that will encourage responsible people to fulfill the social role—bearing and socializing children—that traditionally was performed by the rigidly regulated—religiously, socially and legally—family. We might have opted—and might still opt—for another version of gender equality: Male equality in the tasks of child-rearing and the family home. Before that would be palatable, however, we would have to understand that, while children sometimes provide pleasure to their parents, the ever increasing cost of the modern child must at least in part be borne by the childless segment of the economy. A revitalized, new contract between the generations must address the “free rider” problems and include an equalization of burdens between parents and non-parents, whether by way of tax incentives or subsidy. Did I say “*new*” contract? Plato suggested in 347 B.C. that “he . . . that . . . does not marry when thirty-five years old shall pay a yearly fine . . . lest he imagine that single life brings him gain and ease.”<sup>69</sup>

More immediately, the social contract must return to one basic value judgment: Each child must be guaranteed a decent opportunity in home and school, in life and the economy. That is the individual human dimension. The broader social dimension is that children are economic “infrastructure.” The cost of re-inventing our child-rearing incentive structure must be seen for what it is: a social *investment*, not a consumer expense.

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66. Jerome A. Hoffman & Laura Aldir-Hernandez, *ADA May Let Workers Do Some Jobs at Home*, NAT'L L.J., Oct. 26, 1992, at 34.

67. *The Papers that Ate America*, ECONOMIST, Oct. 10, 1992, at 24.

68. *Id.*

69. 1 PLATO, LAWS 313 (R. Bury trans., 1926).